STATE OF MICHIGAN

COURT OF APPEALS

ERIC SHANBURN,

Plaintiff-Appellant,

v

CARLESIMO PRODUCTS, INC.,

Defendant-Appellee,

and

ANGELOS SUPPLIES, INC.,

Defendant.

UNPUBLISHED
December 28, 2006

No. 271434
Oakland Circuit Court
LC No. 2004-059337-NO

Before: Jansen, P.J., and Bandstra and Sawyer, JJ.

PER CURIAM.

Plaintiff Eric Shanburn appeals as of right the trial court's grant of summary disposition to defendant Carlesimo Products, Inc.[1] We reverse.

Plaintiff owns residential property located at 20983 Kenwood in the City of Farmington Hills. Defendant operates a concrete products manufacturing plant, manufacturing items such as concrete catch basins, man holes, gate walls and specialty concrete products, on property zoned LI-1 light industrial located at 29800 West Eight Mile Road. Defendant's property adjoins plaintiff's property to the south. Plaintiff commenced the instant action, asserting claims sounding in nuisance, private nuisance, public nuisance and nuisance per se. Plaintiff alleged that defendant's operations violate applicable ordinance restrictions for light industrial use, thus constituting a nuisance per se under MCL 125.587, and further, that defendant's operations constitute a public and/or private nuisance in fact, resulting in the diminution or destruction of

[1] Plaintiff's complaint also named Angelos Supplies, Inc. as a defendant. However, Angelos Supplies was dismissed, without prejudice, by stipulation of the parties and it is not a party to this appeal.

the value of plaintiff's home and the infliction of injury on plaintiff, or the exacerbation of his preexisting mental/emotional condition.

Defendant moved for summary disposition, pursuant to MCR 2.116(C)(10), asserting generally that the record evidenced no genuine issue of material fact regarding its compliance with applicable zoning ordinances so as to establish a nuisance per se, or that its operations caused sufficient dust, noise or vibration as to cause actual physical discomfort to persons of ordinary sensibilities so as to constitute a nuisance in fact. The trial court granted defendant's motion, concluding that plaintiff's claims were precluded because he moved to the nuisance.

On appeal, plaintiff argues that the act of "coming to the nuisance" is not a defense to a nuisance per se claim pursuant to MCL 125.587, and further, that while plaintiff's actions in moving next to defendant's operations are a factor to be considered when determining whether to afford plaintiff equitable relief, they do not preclude recovery as a matter of law. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30; 651 NW2d 188 (2002). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the proffered evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.; West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West*, *supra* at 183.

Nuisance is an interference with an owner's reasonable use and enjoyment of his property. *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 151; 422 NW2d 205 (1988) overruled on other grounds, *Puhutski v City of Allen Park*, 465 Mich 675 (2002). There are two basic types of nuisance: public and private. *Id.; Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992).

> A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. It evolved as a doctrine to resolve conflicts between neighboring land uses. Because nuisance covers so many types of harm, it is difficult to articulate an encompassing definition. Imprecision in defining nuisance leads to confusion regarding the interest it is designed to protect. Nevertheless, the gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land. There are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment. The essence of private nuisance is the protection of a property owner's or occupier's reasonable comfort in occupation of the land in question. It involves

> "not only a defect, but threatening or impending danger . . . to the property rights or health of persons sustaining peculiar relations to the same. [*Adkins, supra* at 302-303 (citations omitted).]

By contrast, a public nuisance is an unreasonable interference with a common right enjoyed by the general public, and includes conduct which: (1) significantly interferes with the public's health, safety, peace, comfort, or convenience; (2) is proscribed by law; or (3) was known or should have been known by the actor to be of a continuing nature which produces a permanent or long-lasting significant effect on the public's rights. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). A nuisance arising from the violation of an ordinance is by its nature a public nuisance. *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). A private citizen may pursue an action for a public nuisance if he can show that he suffered a type of harm different from that of the general public. *Cloverleaf, supra* at 190.

A nuisance can be classified as either a nuisance at law, or "per se," or a nuisance in fact or "per accidens." *Hadfield, supra* at 152. As our Supreme Court explained, "a nuisance *per se* is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. Nuisances in fact or *per accidens* are those which become nuisances by reason of circumstances and surroundings." *Id.*, quoting *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959). Pursuant to MCL 125.587, any "building erected, altered, razed, or converted, or a use carried on in violation of a local ordinance or regulation adopted pursuant to this [city or village zoning] act is a nuisance per se," which a court "shall order" abated. Thus, once a use is shown to be in violation of a zoning ordinance, the party bringing the action need not prove a nuisance in fact. *Towne, supra* at 232; *High v Cascade Hills Country Club*, 173 Mich App 622, 629-630; 434 NW2d 199 (1988). And, if a use is determined to constitute a nuisance per se, the court must order the nuisance abated, regardless of its impact upon the health, safety, welfare, and morals of the surrounding community. *City of Lake Angelus v Oakland Co Rd Comm*, 194 Mich App 220, 224; 486 NW2d 64 (1992) ("The use of the word 'shall' in a statue indicated mandatory, rather than discretionary, action."), *Towne, supra* at 231-232; *High, supra* at 630.

In his complaint, plaintiff alleged claims sounding in nuisance per se, public nuisance, private nuisance and nuisance in fact. As noted above, the trial court granted defendant's motion for summary disposition in its entirety, reasoning that "no jury in the world is ever going to do anything about this simply because [plaintiff] moved in" next to defendant's operations. The trial court thus determined that each of plaintiff's nuisance claims were precluded by his actions in coming to the nuisance. Contrary to the trial court's statement, however, the act of coming to a nuisance is a not a defense to an action for nuisance per se brought under MCL 125.587. Rather, such a claim is conclusively established by a showing that a zoning ordinance has been violated. *Towne, supra* at 232.[2] The trial court was thus required to determine whether,

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[2] While defendant attempts to characterize the trial court's rulings as including a determination that, as a matter of law, there was no violation of the City of Farmington Hills zoning ordinance and therefore, no nuisance per se, there simply is nothing in the trial court's ruling to support such a characterization.

considering the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to plaintiff, *Corley, supra* at 278, there was a genuine issue of material fact regarding defendant's compliance with the applicable zoning ordinance before granting defendant's motion. It failed to do so.

Further, as our Supreme Court explained, in *Ensign v Walls* 323 Mich 49, 58-63; 34 NW2d 549 (1948), a party's actions in coming to a nuisance does not, in and of itself, preclude recovery, but rather, is a "circumstance [that] may properly be taken into account in a proceeding of this nature in determining whether the relief sought ought, in equity and good conscience, to be granted." That is, that plaintiff moved next to defendants' operations "may properly be considered in any case of this character in determining whether equitable relief should be granted is scarcely open to question. However it is not necessarily controlling. Looking to all the facts and circumstances involved, the question invariably presented is whether the discretion of the court should be exercised in favor of the parties seeking relief." *Id.* at 62. Thus, the trial court erred to the extent that its ruling assumes that each of plaintiff's nuisance claims were precluded, as a matter of law, by his moving next to defendant's operations. The question before the trial court was whether, considering the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted in the action in a light most favorable to plaintiff, plaintiff presented sufficient evidence to establish a genuine issue of material fact as to whether defendant's operations constitute a nuisance. The trial court wholly failed to address this question.[3]

We reverse the trial court's order granting defendant summary disposition and remand this case for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra

[3] Defendant also asserts in passing, and without any specificity or factual support, that the ordinances governing light industrial districts have been amended over time and that if its operations violate any ordinances, those operations were "grandfathered in" because they preexisted adoption of the pertinent ordinance sections. The ordinance sections relied on by plaintiff, in their current version, appear to have been enacted in or about January 1985, with some sections being amended in 1990 and/or 1997. The title documents for defendant's property, which establish that it was acquired in a series of transactions from 1960 to 1994, and the aerial photographs submitted by plaintiff, establish that defendant's operations have expanded over time, including subsequent to 1985. Thus, defendant's bare assertion in this regard is insufficient to establish that defendant is entitled to judgment on plaintiff's nuisance per se claim as a matter of law.